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Key amendments to Bulgarian arbitration law

The Bulgarian Parliament has recently adopted important amendments to the Law on International Commercial Arbitration (the 'LICA') and Civil Procedure Code (CPC) concerning fundamental issues relating to arbitration, including the scope of non-arbitrable disputes and grounds for setting aside domestic arbitral awards, as well as the criteria for establishing tacit prorogation of arbitral jurisdiction. The 2017 amendment of the Bulgarian arbitration laws also saw the introduction of new minimum professional requirements for arbitrators and the establishment of a state body responsible for exercising limited supervisory functions over arbitrators and arbitration institutions.

These amendments were promulgated on 24 January 2017 and came into force on 28 January 2017.

Expanding the scope of non-arbitrable disputes

Under the 2017 CPC amendment, disputes in which one party is a consumer were added to the list of non-arbitrable disputes. According to the Bulgarian Consumer Protection Act, a 'consumer' is any natural person who acquires products or uses services for purposes that do not fall within the sphere of his or her commercial or professional activities, and any natural person who, as a party to a contract under the Consumer Protection Act, acts outside his or her commercial or professional capacity. The fact that consumer disputes are not arbitrable means that arbitration clauses in consumer contracts are null and void.

The amendment in question was introduced with a view to combating unfairness in arbitrations brought against consumers based on arbitration clauses contained in general terms. The transitional provisions of the law introducing this amendment provide that all arbitration proceedings with respect to non-arbitrable disputes pending at the time the amendment enters into force must be terminated.

Amended grounds for setting aside arbitral awards

Non-arbitrability

Prior to the 2017 amendment, Article 47 of the LICA provided that arbitral awards may be challenged on grounds of non-arbitrability. Under Article 19 of the CPC, disputes involving rights *in rem* in and possession of real estate, alimony and rights arising out of employment relationships, as well as disputes in which one of the participating parties is a 'consumer' are not arbitrable.

The 2017 LICA amendment provides that arbitral awards rendered with respect to non-arbitrable disputes are null and void. Prior to the amendment, arbitral awards rendered in disputes that were not arbitral were *prima facie* valid, but could be later challenged by an interested party before the Supreme Court of Cassation. However, by virtue of the 2017 amendment of the LICA, an interested party may plead the nullity of an arbitral award rendered in a non-arbitrable dispute without challenging the award. The CPC amendment also provides that courts may not issue a writ of execution in relation to an arbitral award rendered in dispute that is non-arbitrable, even if the award has not been set aside.

Public policy

Violation of public policy was introduced as a ground for setting aside domestic arbitral awards by virtue of an amendment to the LICA enacted in 2001. Under the 2017 amendment of the LICA, domestic arbitral awards can no longer be challenged on the grounds that they violate public policy. The legislature's reasons for removing 'violation of public policy' as a ground for challenging awards are unclear. Previously, awards were often challenged for breaches of due process under the 'violation of public policy' ground.

The 2017 amendment creates different regimes for domestic and international arbitration because violations of public policy may still be relied on to challenge international awards under the New York Convention.

Tacit prorogation

Prior to the 2017 amendment of the LICA, an arbitration agreement was deemed to have been concluded when a respondent participated in the arbitral proceedings without challenging the jurisdiction of the arbitral tribunal. This gave rise to disputes and inconsistent case law as to what steps a party could take before being deemed to have participated in the proceedings. The 2017 amendment of the LICA clarifies that filing written objections, submitting evidence, filing a counterclaim or attending the arbitration hearing without challenging the competence of the arbitral tribunal constitutes participation that establishes the arbitral tribunal's jurisdiction. Thus, the mere failure of a respondent to object to the jurisdiction of an arbitral tribunal when such respondent was duly notified about the arbitration proceedings is not sufficient to confer jurisdiction on the tribunal.

Requirements for arbitrators

The 2017 LICA amendment introduced specific professional requirements for arbitrators. Pursuant to Article 11(3) of the LICA, only a person of legal capacity and full age, who has not been sentenced for an intentional criminal offence, has at least eight years of professional experience and possesses high moral qualities is eligible to act as an arbitrator. An arbitrator's appointment may be challenged for lack of these qualifications.

Administrative sanctions

Following the 2017 amendment of the LICA, all arbitrators and arbitration institutions operating in Bulgaria are now subject to supervision by an inspectorate within the Bulgarian Ministry of Justice. The introduction of such supervision is rather controversial insofar as it allows for the Minister of Justice to issue mandatory directions to arbitrators and arbitration institutions, and to impose fines for non-compliance with these directions. Because the nature and scope of these directions is not yet clear, they could well interfere with the independence of arbitrators.

Binding court decision on jurisdiction is available at an early stage of arbitral proceedings

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In a decision that supports the German arbitration law's goal of providing parties with the option of having jurisdiction decided by state courts at an early stage of arbitral proceedings, the Federal Court of Justice held that the final decision by a higher regional court confirming an arbitral tribunal's preliminary ruling on jurisdiction is binding in subsequent proceedings to set aside or enforce the final award.¹

Jurisdictional dispute: claims belonging to the insurer or insured party?

The contract in question concerned the purchase of a testing station for transformers between two German parties. It provided for arbitration in Germany under the Arbitration Rules of the International Chamber of Commerce (the 'ICC Rules'). Once the purchaser of the testing station began use of the station, a fire occurred in connection with the station. The purchaser